REDACTED - FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Telcordia Technologies, Inc. to	)	WC Docket No. 09-109
Reform or Strike Amendment 70, to Institute	)	
Competitive Bidding for Number Portability	)	
Administration and to End the NAPM LLC's	)	
Interim Role in Number Portability	)	
Administration Contract	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

PETITION FOR DECLARATORY RULING

Brendan V. Sullivan Jr.
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for Neustar, Inc.

Aaron M. Panner
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for Neustar, Inc.

October 22, 2014

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Telcordia Technologies, Inc. to	)	WC Docket No. 09-109
Reform or Strike Amendment 70, to Institute	)	
Competitive Bidding for Number Portability	)	
Administration and to End the NAPM LLC's	)	
Interim Role in Number Portability	)	
Administration Contract	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

PETITION FOR DECLARATORY RULING

I. INTRODUCTION AND SUMMARY

This petition seeks Commission action to redress violations of the Federal Advisory Committee Act ("FACA"). A core aim of FACA is to ensure the transparent use of advisory committees to foster public participation and enhance public accountability. The use of advisory committees during the selection process for the Local Number Portability Administrator ("LNPA"), however, has failed both to comply with FACA's statutory requirements and to fulfill its purpose. The resulting LNPA selection process has injured Petitioner and the public, and has failed to provide the Commission a record on which it may legally rely.

As this Petition explains, FACA requires that all federal advisory committees and subgroups thereof that are "established or utilized" by an agency "in the interest of obtaining advice or recommendations"[1] comply with the statute's requirements regarding the maintenance

[1] 5 U.S.C. app. 2 § 3(2)(C).

and disclosure of committee records, open meetings and balanced membership. The Commission established the North American Numbering Council ("NANC") pursuant to FACA to provide the Commission with transparent advice and recommendations on numbering issues, including the selection of impartial numbering administrators. At the Commission's direction, the NANC in turn established the Selection Working Group ("SWG") and delegated to the SWG its LNPA advisory responsibilities—including advising in the selection of an impartial administrator. In both the original LNPA selection process conducted in 1997 and the current LNPA selection process, the SWG performed advisory work and produced reports containing recommendations that were presented to the NANC and forwarded without modification by the NANC to the Commission. The SWG was therefore "established or utilized" by the FCC "in the interest of obtaining advice or recommendations" regarding selection of an LNPA; under the plain language of the statute, as well as Supreme Court and D.C. Circuit precedent interpreting it, the SWG—like the NANC—is subject to FACA.

Despite this, the LNPA selection process has not been conducted in accordance with FACA's requirements. The SWG failed to create and make available records that FACA requires, hold open meetings, or maintain a balanced membership. A comparison with the 1997 SWG highlights these deficiencies: the 1997 SWG had nearly forty organizational members from all segments of the telecommunications industry, held open meetings, and made meeting minutes and internal documents publicly available; in contrast, the current SWG has roughly a dozen members—mostly large carriers—and did none of those things. The NANC also failed to make FACA-required records available and closed at least one critical meeting to the public without complying with the statute.

Under established precedent, where FACA would be rendered a "nullity" by an agency's reliance on advice and recommendations that have been procured through an improper process, the work of the advisory committees must be discarded. That outcome is required here: the Commission cannot lawfully rely on the record generated by the NANC and the SWG in violation of FACA. Moreover, because the record is devoid of sufficient information for the Commission to make a reasoned decision once the tainted recommendations are removed, the Commission must now reopen the selection process in compliance with FACA and its own procedural rules.

Accordingly, pursuant to Section 1.2 of the Commission's rules,[2] this Petition for Declaratory Ruling requests an order declaring that (i) the NANC and SWG are subject to and have violated FACA; (ii) the Commission will not make use of either the NANC LNPA recommendation or the record of the LNPA selection process developed by the NANC and SWG; and (iii) the selection process will be reopened to permit the development of a record that complies with FACA.

II. BACKGROUND

A. The Establishment of the NANC Pursuant to FACA

In 1995, in anticipation of "[c]hanges in the telecommunications industry" that would ultimately lead to the passage of the Telecommunications Act of 1996, the Commission "create[d] the North American Numbering Council (NANC) as a Federal Advisory Committee"[3]

---

[2] 47 C.F.R. § 1.2(a) ("The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

[3] *First Report and Order In the Matter of Admin. of the N. Am. Numbering Plan*, 11 FCC Rcd. 2588, 2590 ¶ 1, 2608 ¶ 42 (1995) ("*Numbering Plan Order*").

and appointed its members.[4] The NANC was designed to be an "industry oversight committee"—combining technical expertise with FACA's public access requirements to serve as a transparent liaison between the telecommunications industry and the Commission in a three-tiered "industry model."[5] Specifically, the NANC was tasked with "provid[ing] to the Commission advice and recommendations reached through consensus to foster efficient and impartial number administration" and selecting impartial numbering administrators.[6]

In creating the NANC, the Commission explicitly rejected interested parties' arguments "that a committee established by the Commission to obtain policy advice on numbering matters would not be subject to the FACA."[7] The Commission stated that the NANC "must meet the requirements of the FACA because we will seek advice and recommendations from this council. . . . [and] FACA will ensure that its activity and advice to the Commission is the result of open and impartial discussion."[8] Accordingly, the Commission concluded that "the broad representation and public access requirements of FACA will prevent industry perceptions that

[4] *See Charter of the North American Numbering Council*, approved Oct. 5, 1995, as renewed November 20, 2013, on file with Network Services Division, Common Carrier Bureau, FCC, ¶ 12 ("NANC Charter") ("Members of the Council are appointed by the Chairman of the Commission in consultation with appropriate Commission staff.").

[5] *See Numbering Plan Order*, 11 FCC Rcd. at 2605–06 ¶¶ 34–39; *see also First Report and Order and Further Notice of Proposed Rulemaking In the Matter of Telephone Number Portability*, 11 FCC Rcd. 8352, 8401 ¶ 93 (1996) ("*First Portability Report and Order*") ("The fundamental purpose of the NANC is to act as an oversight committee with the technical and operational expertise to advise the Commission on numbering issues.").

[6] *Numbering Plan Order*, 11 FCC Rcd. at 2609 ¶ 46.

[7] *Id.* at 2610 ¶ 49.

[8] *Id.* ¶ 48.

the NANC is biased, or that it fails to afford to all the opportunity to contribute and be heard with respect to the development of numbering policy."[9]

The Commission also envisioned the possibility that it would create or approve additional subcommittees of the NANC to further assist in advising the agency. The NANC Charter, filed by the Commission, expressly states that: "The Commission may create subcommittees of the NANC [or] [t]he Chairperson of the NANC may appoint subcommittees, with the approval of the Chairman of the Commission or the Chief of the Wireline Competition Bureau."[10]

B. The Creation of the SWG and Its Role in the 1997 LNPA Selection Process

The Telecommunications Act of 1996 (the "Act") mandates number portability and directs the Commission to "create or designate one or more impartial entities to administer telecommunications numbering."[11] To assist it in carrying out this mandate and consistent with the "duties [the Commission] established for the NANC in the *Numbering Plan Order* and the NANC Charter," the Commission directed the NANC to "select as a local number portability administrator . . . one or more independent, non-governmental entities that are not aligned with any particular telecommunications industry segment" and to "oversee the LNPA."[12]

---

[9] *Id.* at 2611 ¶ 53.

[10] *See* NANC Charter, ¶ 13.

[11] 47 U.S.C. § 251(e)(1).

[12] *First Portability Report and Order*, 11 FCC Rcd. at 8401 ¶ 93. *See also Numbering Plan Order*, 11 FCC Rcd. at 2608 ¶ 41 ("[U]se of an advisory committee under the FACA procedures will ensure impartiality.").

The clause of the NANC's Charter that permits the Commission to create subcommittees of the NANC[13] was invoked at the NANC's first meeting addressing local number portability: the SWG was established to "review and make recommendations on [LNPA] issues."[14] It was tasked with preparing a report "to address all issues delegated to North American Numbering Council (NANC) by the Federal Communications Commission (FCC) regarding [LNPA] selection."[15] "In particular, the [SWG] assumed responsibility for . . . determining the neutral third party or parties to act as the local number portability administrator(s)."[16]

Pursuant to its delegated LNPA oversight and advisory responsibilities, the SWG began meeting to conduct "an in-depth review and assessment" of the LNPA selection efforts that were being conducted by telecommunications carriers organized into seven regional LLCs.[17] In conducting these meetings, the SWG made efforts to comply with "the broad representation and public access requirements of FACA" required by the Commission of all its advisory committees providing numbering recommendations in the *Numbering Plan Order*.[18] For example, membership in the SWG was "open to all concerned parties and [was] representative of all

---

[13] *See* NANC Charter, ¶ 13 ("The Commission may create subcommittees of the NANC. The Chairperson of the NANC may appoint subcommittees, with the approval of the Chairman of the Commission or the Chief of the Wireline Competition Bureau.").

[14] *NANC Local Number Portability Administration Selection Working Group Report* (Apr. 25, 1997) ¶ 2.1.2 ("*1997 Working Group Report*"). *See also Second Report and Order In the Matter of Tel. No. Portability*, 12 FCC Rcd. 12281, 12289 ¶ 11 (1997) ("*Second Portability Report and Order*") ("[T]he NANC established the Local Number Portability Administration Selection Working Group [SWG] to review and to make recommendations regarding the administration and operation of local number portability.").

[15] *1997 Working Group Report* ¶ 1.1 (emphasis added).

[16] *Second Portability Report and Order*, 12 FCC Rcd. 12289 ¶ 12.

[17] *See 1997 Working Group Report* ¶ 2.5.2.

[18] *Numbering Plan Order*, 11 FCC Rcd. at 2611 ¶ 53.

segments of the telecommunications industry,"[19] including nearly forty organizational members.[20] SWG "[m]eetings were open to all interested parties from both member and non-member companies and associations"[21] and meeting minutes were recorded and made publicly available, along with internal SWG "e-mail[,] . . . meeting notices, . . . and other correspondence."[22]

On April 25, 1997, the SWG issued its Local Number Portability Administration Selection Working Group Report ("*1997 Working Group Report*"), which, inter alia, recommended "that the NANC approve the [LNPA] selections made by the regional LLCs."[23] Six days later, the NANC "forwarded" the *1997 Working Group Report* without modification to the Commission[24] "as its recommendations on number portability administration . . . [including] what party or parties should be selected as local number portability administrator(s)."[25] The Commission relied on the SWG's advice, adopting the "the recommendations of the [NANC] as set forth in the report to the Commission prepared by the NANC's Local Number Portability Administration Selection Working Group" and incorporating them into a final rule pursuant to notice and comment rulemaking.[26]

---

[19] *1997 Working Group Report* ¶ 2.3.1.

[20] *See id.* App'x A.

[21] *Id.* ¶ 2.6.1.

[22] *Id.* ¶ 2.7.1.

[23] *Id.* ¶ 6.2.4.

[24] *Second Portability Report and Order*, 12 FCC Rcd. at 12283 ¶ 2.

[25] *Id.* at 12292 ¶ 15.

[26] *See* 47 C.F.R. § 52.26(a) (emphasis added); *Second Portability Report and Order*, App'x B.

C. The Role of the SWG in the 2015 LNPA Selection Process

Two Orders released by the Wireline Competition Bureau (the "Bureau") in the spring of 2011 affirmed the SWG's advisory role in 1997 and provided that the SWG would have the same advisory responsibilities and follow the same process in the 2015 LNPA selection.[27] The two 2011 Orders "detail[] the procedures that . . . must [be] follow[ed] in the LNPA selection process."[28]

First, the consensus proposal of the NANC and the North American Portability Management LLC ("NAPM"),[29] attached to the Bureau's Order of March 8, 2011 ("*March 2011 Order*"),[30] explained that the SWG's role in the 2015 LNPA selection process would mirror its role in 1997:

> As it did in 1997, the NANC will establish a Working Group to assist the NANC with its oversight. . . . For the initial LNPA

---

[27] *See* Order, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability*, 26 FCC Rcd. 3685 (rel. Mar. 8, 2011) ("*March 2011 Order*"); Order, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability*, 26 FCC Rcd. 6839 (rel. May 16, 2011) ("*May 2011 Order*").

[28] *May 2011 Order*, 26 FCC Rcd. at 6839 ¶ 1.

[29] The NAPM is an industry consortium resulting from the consolidation of the original regional LLCs. *See May 2011 Order*, 26 FCC Rcd. at 6840 ¶ 4 n.9.

[30] *March 2011 Order*, 26 FCC Rcd. at 3687 ¶ 6. In the *March 2011 Order*, the Bureau sought comment on the NANC/NAPM proposal "regarding their respective roles in the LNPA selection process," *id.* at 3685 ¶ 1, noting that the proposal was "consistent with prior delegations of authority and Commission rules regarding LNPA selection," *id.* at 3687 ¶ 6 (emphasis added). Following comments, in the *May 2011 Order* the Bureau "adopt[ed] the NANC/NAPM Proposal for the LNPA Selection Process" with minor modifications, 26 FCC Rcd. at 6841 ¶ 6, and stated that this Proposal would control the LNPA selection process, *id.* at 6843 ¶ 16 ("We are confident that the revised NANC/NAPM Proposal establishes a transparent, concrete and efficient LNPA Selection Process.").

> selection, a LNPA SWG was formed to address and to submit recommendations on all issues delegated to the NANC by the FCC regarding LNP administration. A similar group—the SWG—will be formed for the current LNPA(s) selection process. The SWG will have [the] primary responsibilities . . . [of] monitor[ing] the LNPA selection . . . [and] issu[ing] a recommendation to the NANC regarding the ultimate LNPA(s) selected by the NAPM LLC. These responsibilities are based directly on the activities of the original LNPA SWG as explained in the *Working Group Report*.[31]

Second, the Bureau's May 16, 2011 Order ("*May 2011 Order*") "affirm[ed] these responsibilities."[32] The Bureau noted that the SWG was established in 1997 "to review and give advice on LNP administration issues" and that, "[b]ased on these recommendations, the Commission approved [the current] administrative structure."[33] The *May 2011 Order* instructed that, as in 1997, the "NANC will establish an LNPA Selection Working Group ('SWG') to oversee the selection process of the LNPA(s)."[34] Further, the Bureau emphasized that "[a]s noted in [the *March 2011*] Order, the SWG will review the FoNPAC's[35] work. Having the SWG perform this review should . . . ensure that the procurement is open and transparent."[36]

However, unlike in 1997, in executing its LNPA advisory responsibilities, the current SWG has not made its minutes or any of its working documents publicly available. For example, at a June 2013 NANC Meeting, NANC Chairman Betty Ann Kane introduced the SWG by

---

[31] *March 2011 Order*, 26 FCC Rcd. at 3696–97 (internal quotation marks omitted).

[32] *May 2011 Order*, 26 FCC Rcd. at 6842 ¶ 13.

[33] *Id.* at 6839–40 ¶¶ 3–4 (emphasis added).

[34] *Id.* at 6845, Attach. A.

[35] The NAPM's Future of the NPAC Advisory Committee. *Id.* at 6842 ¶ 13 & n.33.

[36] *Id*. at 6843 ¶ 13.

noting that "this is just an oral report, there is no document here."[37] One of the SWG Tri-Chairs then provided a cursory oral summary of the SWG's activities:

> So we do not have a written document . . . . We continue to collaborate and receive information from the FoNPAC as they are doing their review. We held a meeting yesterday on the 19th, a joint meeting with the SWG and the FoNPAC, and they will continue as they are reviewing the RFP responses to evaluate those and provide feedback to the SWG. That's our report.[38]

Nor did the SWG open any portion of its meetings to the public or provide justification for closing the meetings. The chart below illustrates the differences between the 1997 and the current SWGs' respective efforts at ensuring transparency and public access.

[37] June 20, 2013 NANC Meeting Transcript at 44.

[38] *Id.* at 44–45; *see also* September 18, 2013 NANC Meeting Transcript at 30 ("We don't have a written report. We have continued to have contact with the LLC and the FoNPAC to oversee their activities. . . . The SWG approved that, had a conference call, approved the language for that, reviewed and approved it on August 14th, and we will just continue to monitor their activities going forward.").

Comparison of SWG Transparency and Public Access
1997 vs 2015

	1997 LNPA SWG	2015 LNPA SWG
Meetings	SWG meetings "were open to all interested parties from both member and non-member companies and associations." -1997 Working Group Report § 2.6.1 Meeting notices were posted on the FCC's website at http://www.fcc.gov/ccb/nanc. -*Id.* § 2.7.1-2	No SWG meetings were noticed or open to the public.
Minutes	"Minutes of the LNPA Selection Working Group meetings [we]re available on the FCC website." -*Id.* § 2.6.4	The SWG failed to record or make available any meeting minutes.
Document Maintenance and Disclosure	"The LNPA Selection Working Group . . . developed a communication process using e-mail to distribute meeting notices, minutes, and other correspondence, followed by posting most documents to [the FCC] website." -*Id.* § 2.7.1	"So we do not have a written document. . . . We continue to collaborate and receive information from the FoNPAC as they are doing their review. . . . That's our report." -June 20, 2013 NANC Meeting Transcript at 44–45 "We don't have a written report. We have continued to have contact with the LLC and the FoNPAC to oversee their activities. . . . [W]e will just continue to monitor their activities going forward." -September 18, 2013 NANC Meeting Transcript at 30

Moreover, as the chart below demonstrates, the current SWG's membership is roughly a third of the nearly forty organizations that comprised the SWG in 1997 and consists of only large carriers, one telecommunications trade association whose largest members sit on the SWG, and a few state regulatory agencies.[39]

[39] *See* Feb. 21, 2013 SWG Report to NANC, *available at* http://www.nanc-chair.org/docs/mtg_docs/Feb13_SWG_Report.ppt (listing SWG Membership as AT&T, CenturyLink, Comcast, Cox, Level3, Sprint Nextel, T-Mobile, Verizon, XO, USTelecom, Kansas Commission, Massachusetts DTC, and the District of Columbia PSC).

Comparison of LNPA SWG Membership
1997 vs 2015

1997 – 38 total participants*		**2015** – 13 total participants**
AT&T	NCTA	AT&T
Cox	Nextel	Cox
Sprint	Nortel	Sprint
AirTouch Communications	NYNEX	CenturyLink
Ameritech	Ohio PUC	Comcast
APCC, Inc.	PACE Long Distance Service	DC PSC
Bell Atlantic	Pacific Bell	Kansas Commission
Bellcore	PCIA	Level 3
BellSouth	Perot Systems	Massachusetts DTC
BellSouth Wireless	SBC	T-Mobile
California PUC	Selectronics	USTelecom
Comptel	Sprint PCS	Verizon
Florida PUC	Stentor	XO
Frontier	Telefonica de Puerto Rico	
GTE	Teleport	
Interstate Fibernet	Time Warner	
Lucent Technologies	USTA	
Maryland PUC	US West	
MCI	WorldCom	

*1997 Working Group Report, App'x A.

**Feb. 21, 2013 SWG Report to NANC

Indeed, of the thirteen initial members of the 2015 SWG reflected on the chart, only [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

In addition, the 1997 SWG convened a LNPA Technical and Operational (T&O) Requirements Task Force represented by 30 "companies and regulatory bodies" to "develop

[40] *See* LNPA Selection Working Group (SWG) Report to NANC on LNPA Vendor Selection Recommendation of the Future of the NPAC Subcommittee (FoNPAC), WC Dkt. No. 09-109 & CC Dkt. No. 95-116, Ex. A (Feb. 26, 2014) ("*2014 Working Group Report*").

initial and future NPAC SMS technical and operational requirements."[41] No such body was constituted by the current SWG to address technical issues.

On February 26, 2014, the SWG sent the NANC its confidential "Report to NANC on LNPA Vendor Selection Recommendation of the Future of the NPAC Subcommittee" ("*2014 Working Group Report*").[42] The NANC "consider[ed] the report and recommendation from the selection working group in terms of selection of recommendation to the Federal Communications Commission for a [LNPA]"[43] in a non-public meeting on March 26, 2014,[44] and "forwarded" the unmodified report to the Bureau on April 24, 2014 as an attachment to the NANC's recommendation of Ericsson as the next LNPA.[45] The NANC recommendation also attached an unmodified "LNPA Selection Working Group (SWG) Selection Process Report," ("*SWG Process Report*") prepared by the SWG in response to the Bureau's "direct[ion] [to] the NANC . . . to include in its ultimate LNPA vendor(s) selection recommendation . . . [f]indings as to

---

[41] North American Numbering Council LNPA Technical and Operational Requirements Task Force Report, §§ 3.1 and 2.1 (Apr. 25, 1997).

[42] *See* Letter from Betty Ann Kane, Chairman NANC, to Julie A. Veach, Chief, Wireline Competition Bureau (Apr. 24, 2014), WC Dkt. No. 09-109 & CC Dkt. No. 95-116 ("April 24, 2014 NANC Letter").

[43] March 27, 2014 NANC Meeting Transcript at 6. *See also id.* (stating that the "[SWG] report will be sent to the commission"). The SWG's oral report at this meeting is along similar lines: "Ann Berkowitz from Verizon along with Tiki Gaugler and Commissioner Why. I'm a tri-chair of the SWG. As Chairman Kane reported this morning, we met with the NANC in a closed session yesterday and our meeting and all the information is subject to NDA." *Id.* at 52.

[44] *See* April 24, 2014 NANC Letter at 1 ("[T]he NANC's recommendation to the [FCC] of a contract vendor to serve as the [LNPA] . . . was agreed to by the NANC members, meeting in closed session on March 26 at the FCC's offices.").

[45] *See* Public Notice, Commission Seeks Comment on the North American Numbering Council's Recommendation of a Vendor to Serve as Local Number Portability Administrator, CC Dkt. No. 95-116, WC Dkt. No. 09-109, DA 14-794, 1 (rel. June 9, 2014) ("June 9 Public Notice").

whether the LNPA selection process was conducted in a fair and impartial ma[nn]er, as contemplated by the (FCC's) March 2011 Order."[46]

The NANC's adoption of the SWG recommendation, and the SWG reports that the NANC passed through without modification, are still not publicly available. On June 25, 2014, these documents, with no accompanying NANC or SWG drafts or working papers, were made available to a limited number of participants under a Revised Protective Order[47] in connection with the Bureau's June 9 Public Notice "Seek[ing] Comment on the [NANC's] Recommendation of a Vendor to Serve as Local Number Portability Administrator" ("June 9 Public Notice").[48] The Bureau stated that "the record generated by this Public Notice will be taken into account as the full Commission considers this matter, including resolving the procedural arguments raised in the record to date and ultimately identifying the vendor that will serve as the LNPA."[49]

D. Petitioner's Request of FACA Records

On July 30, 2014, Counsel for Petitioner requested that the Commission's Designated Federal Officer to the NANC provide copies of the records that FACA mandates be maintained.[50] Citing section 10(b) of FACA, Counsel requested all NANC and SWG "records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other

---

[46] *See* April 24, 2014 NANC Letter at 1–2.

[47] Revised Protective Order, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability*, WC Dkt. No. 09-109, CC Dkt. No. 95-116, DA 14-881 (rel. June 25, 2014).

[48] *See* June 9 Public Notice.

[49] *Id.* at 2.

[50] E-mail from Beth Stewart, Williams & Connolly, to Marilyn Jones and Michelle Sclater, Federal Communications Commission (July 30, 2014, 16:40 EST).

documents" prepared in connection with the LNPA selection process.[51] Counsel for Petitioner reiterated the request on August 4.[52] On August 6, a member of the Bureau's staff informed Petitioner that non-public FACA materials had been made available pursuant to the Bureau's June 25 Revised Protective Order and that public FACA materials could be found on NANC and FCC websites.[53] As detailed below, both the public and non-public records provided by the Bureau are facially deficient under FACA and reveal FACA violations that preclude the Commission's reliance on the LNPA selection record.

On August 22, 2014, Petitioner raised the FACA deficiencies in its Reply as part of the record developed pursuant to the Bureau's June 9 Public Notice.[54] On September 24, Ericsson filed a Sur-Reply to Petitioner's Reply Comments ("Ericsson Sur-Reply"),[55] addressing, among other issues, Petitioner's FACA arguments. Ericsson argued that FACA's requirements do not apply to the SWG, and that, even if they did, Petitioner "has not explained *how* a supposed

---

[51] *Id.*

[52] E-mail from Beth Stewart, Williams & Connolly, to Marilyn Jones and Michelle Sclater, Federal Communications Commission (Aug. 4, 2014, 17:26 EST).

[53] E-mail from Sanford Williams, Federal Communications Commission, to Beth Stewart, Williams & Connolly (Aug. 6, 2014, 17:04 EST).

[54] Reply Comments of Neustar, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability,* WC Dkt. Nos. 07-149 & 09-109, CC Dkt. No. 95-116, 37, 60–63 (filed Aug. 22, 2014) ("Neustar Reply Comments").

[55] Ex Parte Response of Telcordia Technologies, Inc., D/B/A/ Iconectiv To Neustar Reply Comments, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability,* WC Dkt. Nos. 07-149 & 09-109, CC Dkt. No. 95-116, 20–26 (filed Sept. 24, 2014) ("Ericsson Sur-Reply").

FACA violation has actually harmed it."[56] To ensure that the Commission has a record before it on these issues, this Petition expands on the FACA arguments Petitioner previously raised in its Reply Comments and addresses Ericsson's responses to those arguments.

III. ARGUMENT

Both the NANC and the SWG are subject to FACA. FACA defines "advisory committee[s]" to include committees and subgroups thereof that are "established or utilized" by an agency "in the interest of obtaining advice or recommendations."[57] Under Supreme Court and D.C. Circuit precedent, such groups are covered by FACA either when directly established by an agency itself or when established by a quasi-public organization—such as an agency-created federal advisory committee ("FAC")—to "provid[e] advice or recommendations" to the agency.[58]

The Commission created the NANC pursuant to FACA, and directed the NANC to create the SWG and delegate its LNPA advisory responsibilities to that entity. The SWG oversaw the LNPA selection process and recommended an LNPA in 1997—advice the Commission relied on—and it performed the same advisory functions in the 2015 LNPA selection process.

All groups meeting FACA's definition of "advisory committee" are required to maintain and disclose certain records, hold open meetings, and have a "fairly balanced" membership.[59]

---

[56] *Id.* at 20, 25.

[57] 5 U.S.C. app. 2 § 3(2).

[58] *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989); *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997); *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993); *Lorillard, Inc. v. U.S. Food & Drug Admin.*, No. 11-440 (RJL), 2012 WL 3542228 (D.D.C. Aug. 1, 2012).

[59] *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 (D.C. Cir. 1983) (citing 5 U.S.C. app. 2 §§ 5(b)(2) & 10).

Both the NANC and the SWG failed to comply with FACA's requirements. These FACA violations go to the heart of the LNPA selection process and improperly shield the work of the Commission's advisory committees from public accountability. The NANC's and the SWG's lack of transparency also exacerbates procedural irregularities that have marred the LNPA selection process, creating a "perception[] . . . [of] bias[]" that is in tension with the Commission's own stated purpose for subjecting the NANC to FACA.[60] Accordingly, the Commission may not lawfully rely on the work of the NANC or the SWG. Without this work, under its own rules the Commission has no basis on the existing record to select the next LNPA, and must reopen the selection process.

A. The NANC and the SWG Are Both "Advisory Committees" Under FACA.

FACA § 3(2) defines the scope of an "advisory committee" that is subject to the Act's requirements.[61] According to the statute:

> The term 'advisory committee' means <u>any committee</u>, board, commission, council, conference, panel, task force, or other similar group, <u>or any subcommittee or other subgroup thereof</u> . . . , which is—
>
> . . .
>
> (C) <u>established or utilized</u> by one or more agencies, <u>in the interest of obtaining advice or recommendations</u> for . . . one or more agencies . . . .[62]

The NANC is indisputably subject to FACA: the Commission "create[d] the . . . NANC[] as a Federal Advisory Committee"[63] and the NANC Charter was renewed in 2013 "in

[60] *See Numbering Plan Order*, 11 FCC Rcd. at 2611 ¶ 53.

[61] 5 U.S.C. app. 2 § 3(2).

[62] *Id.* (emphasis added).

[63] *See Numbering Plan Order*, 11 FCC Rcd. at 2608 ¶ 42.

accordance with the provisions of the Federal Advisory Committee Act."[64] Like the NANC, the SWG was established by and is utilized by the Commission for the purpose of obtaining advice and recommendations regarding the selection of the LNPA. The SWG is therefore also subject to FACA under the plain definitional language of the statute.

1. The SWG Is Subject to FACA Because It Was "Established" and "Utilized" by the Commission.

Courts have determined that a group may fall under the "established or utilized" prong of FACA § 3(2) either where the agency "establishes" the group—through direct establishment or by selecting the group's members—or where the agency "utilizes" the group, meaning that the group was established by a "quasi-public" entity for the agency or was privately established but managed and controlled by the agency. First, a group is "established" by an agency when it is "directly established" by the Agency itself.[65] The SWG meets this test because the NANC Charter makes clear that, as a NANC subcommittee, the SWG could *only* be established through Commission creation or approval: "The Commission may create subcommittees of the NANC [or] [t]he Chairperson of the NANC may appoint subcommittees, with the approval of the Chairman of the Commission or the Chief of the Wireline Competition Bureau."[66] Indeed, the Bureau directly created the SWG by adopting into its *May 2011 Order*—which "detailed the procedures that the North American Numbering Council . . . must follow"[67]—the NANC/NAPM

---

[64] NANC Charter ¶ 2.

[65] *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 462 (1989) ("'The Act does not apply to . . . *advisory committees not directly established by or for [federal] agencies.*'" (quoting H.R. Rep. No. 92–1403, at 10 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3508, 3509)); *Food Chem. News v. Young*, 900 F.2d 328, 331 (D.C. Cir. 1990).

[66] NANC Charter ¶ 13.

[67] *May 2011 Order*, 26 FCC Rcd. at 6839 ¶ 1 (emphasis added).

Proposal stating that "[t]he NANC will establish an LNPA Selection Working Group."[68] The *May 2011 Order* further demonstrates that the SWG is a creature of the agency by considering—and rejecting—a proposal that the SWG remain in existence past the selection of the LNPA.[69] Instead, the Bureau mandated that the SWG "will disband" upon completion of the advisory task that it had been assigned.[70] SWG Tri-Chair Geoffrey Why confirmed that the SWG was formed by agency order at the September 15, 2011 NANC meeting: "As many of you know, pursuant to FCC order 09-109 [the *May 2011 Order*], the Selection Working Group was formed to oversee the selection process of the LNPA."[71]

Where it remains ambiguous whether a group was directly established by an agency or another entity, courts have held that a group is agency-established if the agency, rather than the other entity, selects the group's members. For example, in *Heartwood, Inc. v. United States Forest Service*, 431 F. Supp. 2d 28 (D.D.C. 2006), the court found that the Hoosier-Shawnee Ecological Analysis Committee was a FAC where its members were selected by the United States Forest Service.[72] In contrast, in *Byrd v. United States EPA*, 174 F.3d 239 (D.C. Cir. 1999), the court determined that a peer review panel convened by an EPA contractor was not a FAC where the members were selected by the contractor, not the EPA.[73] Here, the Commission

---

[68] *Id.* at 6845, Attach. A.

[69] *Id.* at 6842 ¶ 11 ("We decline to implement this recommendation. The Bureau stated in the *March 2011 Order* that the SWG will disband after the Commission approves the vendor(s) selection. Once the Commission approves the vendor(s) selection, the SWG's work will be complete.").

[70] *Id.*

[71] September 15, 2011 NANC Meeting Transcript at 43 (emphasis added).

[72] *Heartwood*, 431 F. Supp. 2d at 34.

[73] *Byrd*, 174 F.3d at 247.

selected the SWG's members because it appointed the members of the NANC and ordered, in the *May 2011 Order* adopting the NAPM/NANC Proposal, that the members of the SWG be limited to the members of the NANC that the Commission had already appointed.[74] The NANC had no authority to appoint an organizational member to the SWG that was not appointed and approved by the Commission, and did not do so; all SWG organizational members are also on the NANC.[75]

Moreover, even if the SWG was established by the NANC rather than the Commission, the SWG is still subject to FACA because it is "utilized" by the Commission, an alternative basis for FACA's application under § 3(2). Both the Supreme Court and the D.C. Circuit have specifically held that a committee is "utilized" by an agency under FACA when the committee is formed by "a quasi-public entity" for the agency.[76] As the D.C. Circuit has explained, whether an advisory committee is "utilized" by the federal government "focuses not so much on *how* it is used but whether or not the character of its creating institution can be thought to have a quasi-

[74] *See May 2011 Order*, 26 FCC Rcd. at 6845, Attach. A.

[75] Additionally, the Commission funded the NANC and likely funded the SWG—comprised solely of NANC members—as well. *See* NANC Charter ¶ 7 ("The estimated annual cost to the Commission of operating the Committee is $170,000."); *see also Byrd*, 174 F.3d at 247 ("Finally, ERG, not EPA, paid the panelists from its own funds."); *Heartwood*, 431 F. Supp. 2d at 34 (finding agency establishment where the United States Forest Service "identified the members of the team, contracted directly with them for their services, paid them, and provided them with initial questions to answer").

[76] *See Pub. Citizen*, 491 U.S. at 462 ("The phrase 'or utilized' therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations . . .'for' public agencies as well as 'by' such agencies themselves."); *Shalala*, 104 F.3d at 431 (concluding that a committee formed by the National Academy of Sciences ("NAS") was "utilized" by the Department of Health and Human Services ("HHS"), and thus subject to FACA, because "HHS relies on its work product and because it was formed by the NAS, a quasi-public entity").

public status."[77] An entity is "quasi-public" when it is not "purely private"; for example, an entity is "quasi-public" when it is "formed and funded [by the Government] . . . 'for the explicit purpose of furnishing advice to the Government.'"[78]

The NANC is a paradigmatic "quasi-public" entity as it is a federal advisory committee that the Commission created for the purpose of, among other things, "advis[ing] the Commission on numbering policy and technical issues, initially resolv[ing] disputes as directed by the Commission, and provid[ing] guidance . . . as directed by the Commission."[79] Pursuant to the NANC Charter, the Commission funds the NANC.[80] Plainly, the NANC is not a "purely private" entity. The SWG was created, in turn, through the NANC at the agency's specific direction, pursuant to the *May 2011* Order.[81] And, as explained below, the SWG was created for the Commission: to perform the same LNPA selection oversight and advisory responsibilities that the Commission had delegated to the NANC.[82] Thus, whether the SWG was established by the NANC or the Commission itself, the result is the same.

Finally, even if the NANC could be considered a "purely private" entity—which it cannot—the SWG would still be "utilized" by a federal agency because the Commission

---

[77] *Shalala*, 104 F.3d at 428.

[78] *Id.* at 429 (quoting *Pub. Citizen*, 491 U.S. at 460 & n.11). *See also Byrd*, 174 F.3d at 245–46 ("We have interpreted 'utilized' to encompass 'management . . . by any semiprivate entity the Federal Government helped bring into being.'" (quoting *Young*, 900 F.2d at 333) (alterations and internal quotation marks omitted)).

[79] NANC Charter, ¶ 3.

[80] *See id.* ¶ 7.

[81] *See May 2011 Order*, 26 FCC Rcd. at 6845, Attach. A.

[82] *See March 2011 Order*, 26 FCC Rcd. at 3696, Attach. A; *infra* pp. 26–29.

exercised "actual management or control" over the SWG.[83] In its *May 2011 Order*, the Commission made clear that it would maintain strict control over the SWG. The Commission ordered that the "SWG will . . . provide policy guidance as outlined by the FCC,"[84] that "FCC staff may attend any meeting of the SWG,"[85] that "[i]f the SWG is unable to reach consensus regarding any issue, the issue shall be referred for resolution to the FCC,"[86] and that "the SWG will disband after the Commission approves the vendor(s) selection."[87]

In line with these commands, the Commission managed and controlled the SWG process from beginning to end. **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] **[END CONFIDENTIAL INFORMATION]** In short, the SWG was not operating independently; instead, it was directed and controlled by the

[83] *See Byrd*, 174 F.3d at 246 (noting that, even if a private entity establishes a group, the group may still be subject to FACA if an agency exercises "actual management or control" of the group) (emphasis and internal quotation marks omitted).

[84] *May 2011 Order*, 26 FCC Rcd. at 6846, Attach. A.

[85] *Id.* at 6845.

[86] *Id.* at 6847.

[87] *Id.* at 6842 ¶ 11.

[88] *SWG Process Report* at 7.

[89] *Id.* at 8.

[90] *Id.* at 15.

Commission at every critical point of the LNPA selection process, meaning that it was "utilized" by the agency regardless of the public or private status of the NANC.

2. The Commission Has Relied, and Has Suggested that It May Again Rely, on the SWG's Advice or Recommendations.

Because the Commission relied on the SWG's advisory work product in 1997 to carry out the LNPA selection process and select an LNPA, and because the agency has raised the possibility that it will do so again in the current LNPA selection process, the SWG was "established or utilized by [the Commission] . . . in the interest of obtaining advice or recommendations."[91]

Courts have interpreted FACA's "advice or recommendations" language broadly, both in terms of the content of the recommendations and the manner in which the recommendations are presented to the agency. First, courts have read "advice or recommendations" to encompass any work product on which an agency ultimately relies in making policy decisions.[92] For example, in *Nw. Forest Res. Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994), where a group "made only a technical assessment of various management options" that the agency "considered . . . in selecting a policy to implement," the court held FACA's "advice or recommendations" language satisfied.[93] Similarly, in *Heartwood*, the court found that a group's draft reports and assessments

---

[91] 5 U.S.C. app. 2 § 3(2).

[92] *See Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 611–12 (D.C. Cir. 1996) (finding that a committee established by the United States Forestry Service to create a scientific review of the remaining old growth of the Sierra Nevada national forests was subject to FACA's requirements because the factual review was "an essential element of the Forest Service's long-term plan for ecosystem management" and was being used to draft an environmental impact statement) (internal quotation marks omitted).

[93] *Espy*, 846 F. Supp. at 1013 (internal quotation marks omitted). The court went on to hold that "render[ing] policy advice" to an agency clearly constitutes "advice or recommendations" but noted that "there is nothing in the statutory language or case law" that requires that a group actually make policy recommendations to an agency for that group to be subject to FACA. *Id.*

that "provided the [agency] with only narrative summaries of scientific information, and made no policy recommendations" constituted "advice or recommendations" because the group's work "provide[d] the framework, context and information that the [agency] will rely on in making policy decisions."[94]

Indeed, the D.C. Circuit has made it clear that even when subgroups perform merely "preliminary . . . staff work," [95] if their "reports are transmitted directly to federal decision makers before they are made publicly available [or] the [parent advisory committee] is merely 'rubber stamping' the [subgroups'] recommendations with little or no independent consideration," the subgroups "themselves [are] subject to the requirements of the FACA."[96] Only where a subgroup performs staff work and the parent committee "exhaustively review[s] and revise[s]" the subgroup's preliminary work product before transmitting it to the agency would such work not constitute "advice or recommendations."[97]

Second, the D.C. Circuit has concluded that a group need not advise or report to an agency directly to be subject to FACA, finding that the "statutory language does not remotely support" such a requirement.[98] In *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), the court considered whether a working group of a Presidential Task Force working on healthcare reform was covered by FACA. The court

---

[94] 431 F. Supp. 2d at 35.

[95] *See Nat'l Anti-Hunger Coal. v. Exec. Comm. of President's Private Sector Survey on Cost Control*, 557 F. Supp. 524, 529 (D.D.C. 1983), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983).

[96] *Nat'l Anti-Hunger*, 711 F.2d at 1075–76.

[97] *Id.* at 1075 (emphasis added).

[98] *See Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 912 (D.C. Cir. 1993).

rejected the government's argument that the working group "is not in contact with the President and is not, therefore, [subject to FACA]."[99] Even though the working group merely provided materials to the Task Force to review and incorporate into proposals on health care reform, and even though it had "no contact with the President," this did not remove the working group from FACA's reach.[100]

Even the limited LNPA selection record available to the public demonstrates that the SWG was established or utilized "in the interest of providing advice or recommendations" to the Commission. First, the SWG directly provided the agency with advice and recommendations in the 1997 LNPA selection process. When the Commission created the NANC, it stated that the NANC would "provide to the Commission advice and recommendations" on numbering administration[101] and the NANC delegated "all issues delegated to the NANC by the FCC regarding LNP administration"—including selecting an LNPA—to the SWG.[102] The SWG provided recommendations to the Commission in the *1997 Working Group Report*, and the Commission implemented policy "[b]ased on these recommendations,"[103] adopting them into a final rule and giving them "the force of law."[104]

---

[99] *Id.*

[100] *Id.* at 901. The court ultimately found that it had an insufficient record to determine whether the working group was subject to FACA, as it was not clear whether the working group was offering advice "as a group" or "as a collection of individuals," and remanded. *Id.* at 913 (emphasis omitted).

[101] *Numbering Plan Order*, 11 FCC Rcd. at 2609 ¶ 46.

[102] *March 2011 Order*, 26 FCC Rcd. at 3696, Attach. A (internal quotation marks omitted).

[103] *May 2011 Order*, 26 FCC Rcd. at 6840 ¶ 4.

[104] *See March 2011 Order*, 26 FCC Rcd. at 3694, Attach. A; 47 C.F.R. § 52.26(a).

Second, the Commission has indicated that it may again rely on the SWG's work product in making LNPA policy. The NANC/NAPM Proposal, which the Bureau in its *March 2011 Order* determined was "consistent with prior delegations of authority and Commission rules regarding LNPA selection,"[105] provides that the SWG's "responsibilities are based directly on the activities of the original LNPA SWG as explained in the *Working Group Report*."[106] The Bureau "affirm[ed] these responsibilities" in the *May 2011 Order*, stating, "[a]s noted in that Order, the SWG will review the FoNPAC's work . . . . ensur[ing] that the procurement is open and transparent."[107] The SWG reviewed the FoNPAC's work and reported its recommendations in the *2014 Working Group Report*, which the NANC "forwarded" to the Commission.[108] Even if characterized as mere "technical assessment of various [LNPA] options," rather than direct policy advice, the *2014 Working Group Report* constitutes "advice or recommendations" because the Commission will "consider[] . . . [the *2014 Working Group Report*] in selecting a policy to implement"[109]—namely, which vendor will serve as the next LNPA.[110] Additionally, the SWG's *Selection Process Report*, prepared in response to the Commission's requests to the NANC to

[105] *Id.* at 3687 ¶ 6.

[106] *Id.* at 3697, Attach. A.

[107] *May 2011 Order*, 26 FCC Rcd. at 6842–43 ¶ 13.

[108] *See* June 9 Public Notice.

[109] *See Espy*, 846 F. Supp. at 1013 (internal quotation marks omitted).

[110] As its name suggests, the SWG exists to advise the Commission on selecting the next LNPA. At the September 15, 2011 NANC meeting, in response to a request from NANC Chairman Betty Ann Kane to "in two or three sentences explain what the Selection Working Group is selecting, what its all about," SWG Tri-Chair Geoffrey Why stated, "The new LNPA, the new administrator for numbering." September 15, 2011 NANC Meeting Transcript at 44.

evaluate the fairness of the process,[111] goes to the "framework, context and information that [the Commission] will rely on" in making LNPA policy decisions. The Bureau has confirmed this, stating that the Commission will consider both the *2014 Working Group Report* and the *Selection Process Report*, as well as the comments made on these reports, in "resolving the procedural arguments raised in the record to date and ultimately identifying the vendor that will serve as the LNPA."[112]

Third, as a practical matter, the Commission has no federal advisory committee work product to rely on in making its LNPA selection and determining the fairness of the process other than the NANC recommendation and the attached *2014 Working Group Report* and *Selection Process Report*. The NANC recommendation [**BEGIN CONFIDENTIAL INFORMATION]** [redacted] [**END CONFIDENTIAL INFORMATION**] That these SWG work products were sent to the Commission before being made public and without alteration from the NANC evidences their advisory nature and precludes any argument that the SWG was merely performing preliminary "staff work" for the NANC that the NANC "exhaustively reviewed and revised."[114] Indeed, the NANC has publicly

[111] *See* April 24, 2014 NANC Letter at 2.

[112] June 9 Public Notice at 2.

[113] *See* April 24, 2014 Recommendation of a Contract Vendor for the Local Numbering Portability Administrator, WC Dkt. No. 09-109, CC Dkt. No. 95-116.

[114] *See Nat'l Anti-Hunger*, 711 F.2d at 1075–76. For additional reasons, it would be incongruous to consider the SWG the NANC's staff, doing mere staff work. In keeping with FACA's requirement that each federal advisory committee Charter must "contain provisions which will assure that the advisory committee will have adequate staff," *see* 5 U.S.C. app. 2 § 5(b)(5), the NANC Charter specifically provides for Commission-supplied NANC staff. *See* NANC Charter

stated that it reviewed the *2014 Working Group Report*—the result of a nearly three year process—for only one day, and that it merely "reviewed" the *Selection Process Report* and submitted it to the Bureau "without objection."[115] Under the plain language of the statute, the case law interpreting it, and as a matter of common sense, the SWG was established or utilized "in the interest of obtaining advice or recommendations" for the Commission.

3. Courts Have Held FAC Subgroups Accountable Under FACA on Similar Facts.

The proposition that a federal advisory committee's working group is subject to FACA when it is "established or utilized . . . in the interest of obtaining advice or recommendations" for an agency is well-established. Besides being an obvious reading of the statutory language, this conclusion was recently affirmed on similar facts by Judge Leon in *Lorillard, Inc. v. United States Food & Drug Administration*, No. 11-440 (RJL), 2012 WL 3542228 (D.D.C. Aug. 1, 2012). In *Lorillard*, the plaintiffs claimed that the Food and Drug Administration's ("FDA") federal advisory committee, the Tobacco Products Scientific Advisory Committee ("TPSAC"), as well as the TPSAC's Menthol Report Subcommittee and its "writing groups"—tasked with drafting the Menthol Report, the TPSAC's report on the use of menthol in cigarettes—had all violated FACA's disclosure requirements.[116] In moving to dismiss, the FDA argued that "FACA's disclosure requirements do not apply to the subcommittees that drafted the [Menthol

---

¶ 6 ("The Commission will provide the necessary staff support for the Council."). The SWG cannot be considered the NANC's Commission-supplied staff because all SWG organizational members also serve on the NANC. By contrast, the Order establishing the advisory committee in *Nat'l Anti-Hunger* provided that "[t]he Committee is to be funded, staffed and equipped . . . by the private sector without cost to the Federal Government" and the task forces were specifically organized "[t]o implement this objective." 557 F. Supp. at 526 (internal quotation marks omitted).

[115] *See* April 24, 2014 NANC Letter.

[116] 2012 WL 3542228, at *3.

Report]"[117] because these groups performed "[p]urely [s]taff [f]unction[s]," presented their work to the TPSAC—rather than the FDA—and because, "TPSAC, not the writing groups, provided the advice directly to the FDA after careful independent consideration."[118] The FDA also raised the policy argument that "[s]ubjecting such working groups to the disclosure requirements would be inconsistent with FACA's purpose of promoting efficiency and with longstanding government practice."[119]

In denying the FDA's motion to dismiss, Judge Leon held that "based on the facts currently in the record, . . . the Menthol Report Subcommittee and its writing groups are advisory committees under FACA because they were organized, managed, and funded by FDA, consisted only of TPSAC members, and performed a major task of the committee: drafting the Menthol Report."[120] The court simply applied the language of the statute to find that "because the subcommittee and its writing groups were 'established or utilized' by the FDA 'in the interest of obtaining advice or recommendations,'" they were advisory committees under FACA.[121] The *Lorillard* court's holding reflects what the statutory language and D.C. Circuit precedent make clear: where, as here, a subgroup of an agency-created federal advisory committee provides

---

[117] *Id.* at *1.

[118] Defs.' Mot. to Dismiss, Lorillard, Inc., et al., Plaintiffs, v. United States Food and Drug Administration, et al., Defendants, No. 11-cv-440 (RJL) 2011 WL 4021351 (D.D.C. Sept. 8, 2011).

[119] *Id.*

[120] 2012 WL 3542228, at *3 (internal quotation marks omitted).

[121] *Id.* (quoting 5 U.S.C. app. 2 § 3(2)). The court did not disturb this conclusion in its ruling granting the plaintiffs' motion for summary judgment on a different claim. *See Lorillard, Inc. v. U.S. Food & Drug Admin.*, No. 11-440 (RJL), 2014 WL 3585883, at *9 (D.D.C. July 21, 2014) ("I denied defendants' motion to dismiss. . . . conclud[ing] that . . . the Menthol Report Subcommittee and its writing groups were advisory committees under FACA.").

advice or recommendations to the parent committee that are then passed on to the agency, the subgroup is also subject to FACA.[122]

In its Sur-Reply, Ericsson's only argument as to why the SWG is not subject to FACA is that, under the General Services Administration's ("GSA") regulations implementing the statute, "FACA requirements do not apply to subcommittees of advisory committees, like the SWG, when they report to a parent advisory committee which then undertakes further deliberations."[123] However, both the Supreme Court and the D.C. Circuit have refused to defer to the GSA's regulations governing the application of FACA's definitional language. First, as FACA permits GSA to issue only "administrative guidelines and management controls applicable to advisory committees,"[124] the Supreme Court in *Public Citizen* held that FACA "does not empower the [GSA] to issue . . . a regulatory definition of 'advisory committee' carrying the force of law."[125] Second, the Court also held that because the GSA's regulations were promulgated "more than a decade after FACA's passage," deference is less appropriate "than it would be were the regulatory definition a contemporaneous construction of the statute."[126] Third, as the D.C. Circuit noted in declining to defer to the GSA's FACA regulations in *Association of American*

---

[122] *See Nat'l Anti-Hunger*, 711 F.2d at 1075.

[123] *See* Ericsson Sur-Reply at 21 & n.23 (citing 41 C.F.R. §§ 102-3.35(a) ("In general, the requirements of the Act . . . do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency.") & 102-3.145 ("If a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements of this subpart.")).

[124] 5 U.S.C. app. 2 § 7(c).

[125] *Pub. Citizen*, 491 U.S. at 463 n.12 (emphasis added).

[126] *Id.* (collecting cases).

Physicians & Surgeons, courts "do not defer to an agency's construction of a statute interpreted by more than one agency . . . let alone one applicable to all agencies."[127]

Moreover, the GSA regulations cited by Ericsson would be rejected under the first step of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because they contradict the plain language of the statute and clearly expressed congressional intent: under FACA § 3(2), *any* subcommittee or other subgroup of an advisory committee established or utilized by an agency in the interest of obtaining advice is, itself, an advisory committee, whether or not it reports to a parent committee. The clear statutory text controls, and "that is the end of the matter . . . ."[128]

For these reasons, no court has held that subcommittees that report to parent committees are exempt from FACA on the basis of the GSA's implementing regulations. Indeed, the same argument relied on by Ericsson was also advanced by the FDA in its motion to dismiss in *Lorillard*.[129] Judge Leon rejected it without discussion in holding that the Menthol Report Subcommittee and its writing groups were FACs.[130] Thus, as the plain language of FACA and the case law interpreting it demonstrate, Ericsson's reliance on "GSA's interpretation of FACA's

---

[127] *Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 913.

[128] *Chevron*, 467 U.S. at 842.

[129] *See* Defs.' Mot. to Dismiss Pls.' Fifth Cause of Action, Lorillard, Inc., et al., Plaintiffs, v. United States Food and Drug Administration, et al., Defendants., No. 11-cv-440 (RJL) 2011 WL 4021351 (D.D.C. Sept. 8, 2011) ("Interpreting FACA not to apply to working groups performing staff functions is also consistent with the FACA implementing regulations. The General Service Administration's implementing regulations provide that a subcommittee is subject to FACA only if it 'makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations.'" (quoting 41 C.F.R. §102-19 3.145)).

[130] *See Lorillard*, 2012 WL 3542228, at *3.

provisions . . . confuses wish with reality."[131] Moreover, even the GSA regulations themselves caution that "it is not permissible for parent advisory committees simply to 'rubber-stamp' the advice or recommendations of their subcommittees, thereby depriving the public of its opportunity to know about, and participate contemporaneously in, an advisory committee's deliberations."[132] As explained above, that is what happened here—the NANC "rubber-stamped" the SWG's recommendation and forwarded it to the Commission without modification.[133]

B. The SWG and the NANC Failed To Comply with FACA.

FACA requires the maintenance and disclosure of records, open meetings, and fairly balanced membership. When a group falls within FACA's definition, each of these requirements applies.[134] The SWG violated FACA by failing to create or make available its minutes, drafts, working papers and other required documents created for or by the SWG or its individual members; to hold open meetings; and to meet FACA's balanced membership requirement.[135] Additionally, the NANC violated FACA by failing to make available drafts, working papers, and other required documents created for or by the NANC or its individual members; and by failing to comply with FACA's open meeting requirement in at least one critical instance.

---

[131] *Pub. Citizen*, 491 U.S. at 463 n.12.

[132] GSA, Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,729 (July 19, 2001).

[133] *See supra* p. 28–29.

[134] *See Nat'l Anti-Hunger*, 711 F.2d at 1073.

[135] In addition to doing its work in violation of FACA, the SWG was also improperly convened under FACA as it was not established as an advisory committee "as a matter of formal record" in violation of FACA § 9(a) and it failed to file a charter in violation of FACA § 9(c). *See Espy*, 846 F. Supp. at 1013–14 ("Having concluded that FEMAT was subject to FACA, the Court also finds that FEMAT was convened and did its work in violation of the Act's requirements.").

1. FACA Requires the Maintenance and Disclosure of Records, Open Meetings, and Balanced Membership.

Under FACA § 10, there is a non-discretionary obligation that "[d]etailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee."[136]

In addition, FACA provides that "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection."[137]

FACA further ensures public access and transparency by requiring that "[e]ach advisory committee meeting shall be open to the public" and that "timely notice of each such meeting shall be published in the Federal Register."[138]

Although FACA's public meeting requirement and duty to make records available under Section 10 are subject to the exemptions set forth in the Freedom of Information Act

---

[136] 5 U.S.C. app. 2 § 10(c). The NANC Charter independently recognizes the NANC's and the SWG's recordkeeping obligations, providing that "[t]he Council shall keep records of its proceedings, as required by applicable laws and regulations. . . . [and] handle all its records and any records of formally and informally established subcommittees or other subgroups of the Council, in accordance with General Records Schedule 26, Item 2." NANC Charter ¶ 14. GRS 26, Item 2 provides for the preservation of "documentation of subcommittees, working groups, or other subgroups of advisory committees, that support their reports and recommendations to the full or parent committee. This documentation may include, but is not limited to minutes, transcripts, reports, correspondence, briefing materials, and other related records." General Records Schedule 26, Item 2.

[137] 5 U.S.C. app. 2 § 10(b). Section 10(b) is "one of the key sections in the legislation . . . . [that] provides an opportunity for interested parties to present their views and be informed," S. Rep. No. 92-1098, at 14 (1972), and was enacted by Congress to prevent "subjective influences not in the public interest" from controlling the work of the committees. *Id.* at 6. Accordingly, "[t]he standard of openness and public inspection of advisory committee records is to be liberally construed." *Id.* at 14.

[138] *See* 5 U.S.C. app. 2 § 10(a)(1) & (2).

("FOIA"),[139] such as when records would disclose "trade secrets and commercial or financial information obtained from a person and privileged and confidential,"[140] these exceptions do not apply to a FAC's duty to generate the public records in the first instance.[141] Nor does the existence of a non-disclosure or confidentiality agreement shield federal advisory committee documents from public disclosure.[142] Instead, an agency must make a detailed showing that any withheld FAC documents are subject to a specific FOIA exemption.[143] Additionally, even if an agency establishes that certain parts of advisory committee records fall within a FOIA exemption, the agency "must nonetheless disclose all reasonably segregable, nonexempt portions of the requested record(s)," rather than fail to produce the information altogether.[144] Similarly, with respect to FACA's open meeting requirement, an agency may not "sweep[] entire advisory committee meetings under the general allegation of a [FOIA] exemption"—the agency must, at a minimum, provide a "relatively detailed analysis of the bases for closing various portions of the

[139] *See* 5 U.S.C. app. 2 § 10(d).

[140] *See* 5 U.S.C. § 552(b)(4).

[141] *See* 5 U.S.C. app. 2 § 10. Nor does FOIA's "deliberative process privilege" apply to FACs such as the NANC or the SWG. *See Heartwood*, 431 F. Supp. 2d at 36 ("This exemption is not available to documents revealing an advisory committee's deliberative process because the exemption applies only to agencies." (citing 5 U.S.C. § 552(b)(5))).

[142] *See Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 845 F. Supp. 2d 252, 258 (D.D.C. 2012) *rev'd on other grounds*, 718 F.3d 899 (D.C. Cir. 2013) ("A per se rule that the existence of a confidentiality agreement provides an adequate basis for proper classification of a covered document is flatly incompatible with FOIA's commitment to subject government activity to the critical lens of public scrutiny." (internal quotation marks omitted)).

[143] *See Judicial Watch, Inc. v. U.S. Dep't of Def.*, 963 F. Supp. 2d 6, 11 (D.D.C. 2013).

[144] *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003) (citing 5 U.S.C. § 552(b)).

meetings."[145] If an agency wishes to close all portions of a meeting of one of its FACs from the public, it bears the burden of "showing specifically that all portions of all meetings should be closed."[146]

Finally, FACA § 5(b)(2) requires "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[147] Agencies have an affirmative duty to ensure their FACs' compliance with FACA's fairly balanced requirement.[148]

2. The SWG Failed To Create Meeting Minutes.

[**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**] The

[145] *Nader v. Dunlop*, 370 F. Supp. 177, 179 (D.D.C. 1973) (internal quotation marks omitted).

[146] *Id.* (emphasis omitted).

[147] 5 U.S.C. app. 2 § 5(b)(2). Although § 5(b) applies on its face to committees established by Congress, "[Section] 5(c) applies all relevant requirements of § 5(b) to advisory committees established by agencies." *Cargill, Inc. v. United States*, 173 F.3d 323, 334 n.17 (5th Cir. 1999). One of Congress's primary concerns in passing the FACA was ensuring that "advisory committees not be dominated by 'industry leaders and the like with substantial parochial interest in the outcome.'" *Espy*, 846 F. Supp. at 1013 (quoting *Natural Res. Def. Council, Inc. v. Herrington*, 637 F. Supp. 116, 120 (D.D.C. 1986)). *See also Cummock v. Gore*, 180 F.3d 282, 284 (D.C. Cir. 1999) ("Congress . . . feared the proliferation of costly committees, which were often dominated by representatives of industry and other special interests seeking to advance their own agendas.").

[148] *See Cargill*, 173 F. 3d at 335 n.22 ("An agency shall require the membership of the advisory committee to be fairly balanced in terms of the points of view and the functions to be performed by the advisory committee." (alteration omitted and emphasis added)); *Nat'l Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 336 (2d Cir. 1979) ("If an agency wishes to rely publicly on the backing of an advisory committee, it must do what the statute commands.").

[149] SWG *Selection Process Report* at 1 & n.1.

online websites to which counsel were directed for the FACA records reflect no SWG minutes or written records of its work. The SWG's duty to keep detailed meeting minutes is clear and non-discretionary and its unambiguous failure to do so during this process is a per se violation of FACA.[150]

3. The NANC and the SWG Have Failed To Make Available Drafts, Working Papers, and Other Documents Required by FACA.

FACA requires the maintenance of records "made available to or prepared for or by" groups that are subject to FACA.[151] The LNPA selection process record made available by the Bureau contains no drafts generated by the NANC or working papers generated by individual NANC members; no draft reports generated by the SWG or working papers generated by individual SWG members in reviewing the NAPM's recommendation; or any NAPM draft reports or individual NAPM members' working papers prepared for SWG review. Such drafts and working papers are referenced in the public records[152] and the records of the Revised Protective Order.[153] For example, the NAPM has explained that:

---

[150] The SWG's failure to keep minutes is also inconsistent with the SWG's practice in 1997 as well as the Commission's Orders, the NANC Charter, and the General Record Schedule. *See supra* p. 34 & FN 136.

[151] 5 U.S.C. app. 2 § 10(b) (emphasis added). Section 10(b) does not distinguish between documents that were actually presented to a committee, and those that were not. It suffices that a document be "prepared for" or "available to" the committee. *See id.*

[152] *See* June 20, 2013 NANC Meeting Transcript at 44 (referencing "information" and "feedback" exchanged between the SWG and the NAPM).

[153] [**BEGIN CONFIDENTIAL INFORMATION**] [redacted] [**END CONFIDENTIAL INFORMATION**]

> [I]n addition to the collective analysis performed during numerous meetings, each member company of the . . . FoNPAC[] undertook its own review of each vendor proposal, weighing the submitted materials (including the vendor interview) against the specific RFP criteria and carefully considering the potential impacts and risks of each proposal. These member companies individually spent considerable time over several months to complete this analysis. The FoNPAC met as a committee numerous times over several months to discuss relevant issues, including, but not limited to, the technical qualifications of the vendors, transition costs, and the potential benefits and risks associated with each bidder's proposal.[154]

The NAPM confirmed that these "thorough individual and collective analys[e]s" of the FoNPAC were shared with the SWG and "reflect[ed]" in the NANC recommendation.[155] Unless specifically covered by a FOIA exemption, these documents are therefore subject to FACA's public disclosure requirement,[156] and neither the Bureau, the NANC or the SWG have made the nonexempt portions of these documents publicly available, justified their failure to do so, or even acknowledged the existence of these documents.

4. The NANC and the SWG Have Not Conducted Their Meetings in Accordance with FACA's Open Meetings Requirement.

Courts have refused to "allow the door to close on [FACA] meetings when Congress has expressly ordered the door to be open except on the rarest occasions."[157] Unlike the LNPA selection process that took place in 1997, no SWG meetings have been open to the public and no notices of these meetings have been published in the Federal Register. Nor has the SWG

---

[154] NAPM Notice of Ex Parte, Telephone Number Portability, et al., CC Dkt. No. 95-116; WC Dkt. No. 09-109 (filed Oct. 2, 2014) (internal citations omitted).

[155] *See id.* at 2 & n.5.

[156] *See Heartwood*, 431 F. Supp. 2d at 35 (finding drafts to be subject to disclosure under FACA even though they had been created "in sub-groups or individually, and not as one large group").

[157] *Nader*, 370 F. Supp. at 179.

provided any "detailed analysis of the bases for closing various portions of the meetings," much less any specific "showing . . . that all portions of all meetings should be closed."[158] Thus, all SWG meetings have been conducted in violation of FACA.

Additionally, with respect to at least one critical meeting—the March 26 meeting that constituted the NANC's review of the SWG's three-year LNPA selection work—the NANC also violated FACA's open meetings requirement. The Commission's notice of the closed March 26 NANC meeting was not provided in a timely fashion, in violation of FACA Section 10(a)(2),[159] and no specific showing was made that all portions of the meeting should be closed, in violation of Section 10(d).[160] For example, even if certain portions of the meeting were properly closed to the public because they concerned information exempted by FOIA—such as pricing and trade secret information[161]—the public should have, at the least, been able to participate in any review the NANC may have conducted of the SWG's methodology and the soundness of the SWG's conclusions. Additionally, the Commission failed to put out a summary of the closed meeting as it was required to do pursuant to FACA Section 10(d).[162]

---

[158] *Id.* (emphases and internal quotation marks omitted).

[159] *See* Notice, Federal Communications Commission, 79 Fed. Reg. 14250-14251, CC Dkt. No. 92-237, DA 14-325 (Mar. 13, 2014) ("The notice of this meeting was first published in the Federal Register on March 13, 2014, 13 days in advance of the meeting on March 26, 2014. While the publication did not meet the 15-day requirement for advance publication, exceptional circumstances warrant proceeding with the March 26, 2014 NANC meeting.").

[160] *See* FCC Announces A Closed Meeting of the North American Numbering Council, CC Dkt. No. 92-237, DA 14-325 (rel. May 10, 2014) (stating generally that "[b]ecause no matters other than the LNPA procurement will be addressed at this meeting, the entire meeting is subject to closure").

[161] *See* 5 U.S.C. § 552(b)(4).

[162] *See* 5 U.S.C. app. 2 § 10(d).

5. The SWG's Membership Is Not "Fairly Balanced."

Although membership in the SWG was "open to any individual who [was] a NANC Member, NANC Alternate or technical staff of a NANC member company, association or governmental entity,"[163] the SWG was in fact comprised of a small, industry-heavy subset of the NANC and lacked key stakeholders such as over-the-top VOIP providers, small/medium rural carriers, public safety representatives, and consumer groups. The absence of a consumer group on the SWG is particularly glaring: in the *Numbering Plan Order*, the Commission anticipated that, to be fairly balanced, NANC membership would be "drawn from all segments of the industry including . . . . consumer groups";[164] the NANC Charter reflects that consumer membership is "necessary to address effectively the issues to be considered by the Council";[165] and the *May 2011 Order* noted "the need for balance within the SWG's membership" and that the SWG should reflect the balance of the NANC, "a diverse body with consumer, state government, and industry constituencies represented."[166] The presence of state regulators does

---

[163] *May 2011 Order*, 26 FCC Rcd. at 6845, Attach. A.

[164] 11 FCC Rcd. at 2609 ¶ 47 ("An advisory Committee created under FACA must have a membership fairly balanced in terms of the points of view represented. In meeting this requirement we anticipate [NANC] membership would be drawn from all segments of the industry including LECs, Interexchange Carriers (IXCs), Wireless Service Providers, Competitive Access Providers and other interested parties . . . . We further anticipate council membership will include members representing state interests such as NARUC, state public utility commissions, telecommunications users and other consumer groups.").

[165] NANC Charter ¶ 12 ("Members of the Council are appointed by the Chairman of the Commission in consultation with appropriate Commission staff . . . . to balance the expertise and viewpoints that are necessary to address effectively the issues to be considered by the Council. Members represent various sectors of the telecommunications industry, . . . state regulators, and consumers.").

[166] 26 FCC Rcd. at 6842 ¶ 12 ("The Bureau agrees with Telcordia on the need for balance within the SWG's membership and in its leadership. . . . We note that . . . the NANC is a diverse body with consumer, state government, and industry constituencies represented. The Bureau is confident that the membership . . . of the SWG will reflect this balance.").

nothing to cure this deficiency, as "[o]ne of the dangers that Congress specifically identified in adopting FACA was the risk that governmental officials would be unduly influenced by industry leaders . . . . [and] it is precisely the lack of representatives of the public interest independent of both government and industry that prompted Congress to enact the 'fairly balanced' provision."[167]

Although each of the FACA deficiencies addressed above—the NANC's and the SWG's failure to comply with FACA's disclosure, open meetings, and "fairly balanced" membership requirements—were detailed in Petitioner's Reply Comments, Ericsson's Sur-Reply ignores and thus apparently concedes the first two FACA violations—as, on the facts, it must. The only substantive response Ericsson advances is the argument that the SWG was fairly balanced, despite lacking, among other key stakeholders, a consumer representative. Ericsson raises two points in support of this argument: (1) that "[t]he fact that state consumer advocates elected not to participate does not mean that the SWG wasn't balanced, as they clearly could have participated, and the FACA is primarily concerned with the *ability* to participate"; and (2) "the absence of consumer groups on advisory committees does not violate the fairly balanced provisions when committees render specialized advice regarding highly technical issues such as LNPA selection."[168]

Ericsson's arguments provide no basis for ignoring the SWG's failure to comply with FACA. First, agencies have an affirmative duty to ensure their FACs' compliance with FACA's

---

[167] *Pub. Citizen v. Nat'l Advisory Comm. on Microbiological Criteria for Foods*, 886 F.2d 419, 437 (D.C. Cir. 1989) (Edwards, J. concurring in part and dissenting in part) (per curiam) (citation omitted); *see also id.* ("The fact that [members] are state rather than federal government officials does not demonstrate that they will be less amenable to influence by industry representatives.").

[168] Ericsson Sur-Reply at 22–23.

fair balance requirement.[169] The only case Ericsson relies on in arguing otherwise is *National Anti-Hunger Coalition v. Executive Committee of President's Private Sector Survey on Cost Control*, 711 F.2d 1071 (D.C. Cir. 1983), a case that unambiguously states that "the balanced membership requirement of § 5(b)(2) has clear relevance to all types of advisory committees, and, under the terms of § 5(c), must be followed by the President."[170] Merely providing that an advisory committee's membership is "open" does not insulate the agency from FACA's fair balance requirement, as common sense demonstrates: if, for example, only Sprint participated on the SWG, any argument that the SWG was fairly balanced would clearly be untenable. Nor does Ericsson cite any authority for its statement that FACA's fair balance requirement "is primarily concerned with the *ability* to participate": instead, FACA § 5(b)(2) means what it says.

Ericsson's second argument, that the SWG did not require the participation of consumer groups in order to be fairly balanced, is undermined by the fact that Ericsson itself argued in 2011 that "SWG membership [must] be balanced between industry and state utility and consumer advocate groups."[171] Ericsson had it right the first time: every articulation of what fair balance means with respect to the NANC has included consumer groups[172] and the SWG is the extension of the NANC's LNPA advisory functions. The only case cited by Ericsson supporting its now contradictory assertion is *Public Citizen v. National Advisory Committee on*

---

[169] *See Cargill*, 173 F.3d at 335 n.22; *Califano*, 603 F.2d at 334.

[170] *Nat'l Anti-Hunger*, 711 F.2d at 1073 n.1 (emphases added). Moreover, Ericsson conflates *Nat'l Anti-Hunger*'s discussion of standing with whether FACA is violated in the first instance. *See id.* at 1073.

[171] Ericsson Sur-Reply at 21–22.

[172] *See Numbering Plan Order*, 11 FCC Rcd. at 2609 ¶ 47, NANC Charter ¶ 12; *May 2011 Order*, 26 FCC Rcd. at 6842 ¶ 12.

Microbiological Criteria for Foods, 708 F. Supp. 359 (D.D.C. 1988),[173] in which the district court found that the absence of consumer groups on a committee did not violate FACA because the committee was "charged with a highly technical mandate which requires extensive scientific background"—developing microbiological criteria for food—and the plaintiffs failed to show, in light of this function, that the absence of a consumer representative rendered the group unbalanced.[174] On appeal, one judge agreed with the district court on the merits, one judge would have dismissed on standing grounds, and Judge Edwards dissented, concluding that "a fair balance of viewpoints cannot be achieved without representation of consumer interests" as "[f]ood contamination affects consumers . . . directly."[175]

Here, as in *Microbiological Criteria for Foods*, consumers are directly affected by the SWG's LNPA advisory functions: Congress's stated purpose for passing the 1996 Telecommunications Act and establishing number portability was to "promote competition . . . in order to secure lower prices and higher quality services for American telecommunications

---

[173] *Nat'l Treasury Emps. Union v. Reagan*, No. 88-186, 1988 WL 21700, at *3 (D.D.C. Feb. 26, 1988), the only other case cited by Ericsson, addressed the question of whether a FAC's membership must include "a representative of *every* group that would or conceivably [could be] affected by the [FAC's] work" in order to be fairly balanced. The court rejected a specific public union's claim that, to be balanced, a "Privatization Commission" designed to "study all of the activities of the Federal government and report . . . on which government programs, enterprises and activities are more appropriately part of the private sector" must include a representative of that particular union. *See id.* at *3 (emphasis and internal quotation marks omitted); *see also id.* n.8 ("We note that were we to interpret the FACA provision in question as plaintiff would have us, *all* federal employee unions would logically be entitled to have their *own* representative on the Commission."). However, as the court also noted that the "'fairly balanced' requirement of FACA . . . is designed to allow groups possessing a significant and direct interest in the purpose and work of the Committee to have their views reflected," *see id.* at *3 (emphasis added), the case does not support Ericsson's argument that the absence of such a group here is consistent with FACA.

[174] *See Microbiological Criteria for Foods*, 708 F. Supp. at 363.

[175] *See Microbiological Criteria for Foods*, 886 F.2d at 436 (Edwards, J. concurring in part and dissenting in part).

consumers."[176] Additionally, the SWG was tasked not only with reviewing and advising on "highly technical" aspects of LNPA selection, but also with assessing LNPA factors that directly affect—and are comprehensible to—consumers, such as the pricing of bids and vendor impartiality.[177] Thus, under any reading of *Microbiological Criteria for Foods*, the Commission had an affirmative duty to ensure fair balance, including consumer representation, on the SWG.

Ericsson also argues that the lack of fair balance on the SWG resulted in no "discernible injury."[178] Yet the potential impact of the SWG's lack of balance on the selection process is readily apparent: **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] [**END CONFIDENTIAL INFORMATION**] without balanced input from all segments of the telecommunications industry was thus prejudicial to both Petitioner and the "American telecommunications consumers" the Act was designed to protect.

[176] *See* 1996 Act, 110 Stat. 56 (statement of 1996 Act's purpose).

[177] *See First Portability Report and Order*, 11 FCC Rcd. at 8400–01 ¶ 92 ("Neutral third party administration of the carrier routing information also ensures the equal treatment of all carriers and avoids any appearance of impropriety or anti-competitive conduct. . . . facilitat[ing] consumer's access to the public switched network by preventing any one carrier from interfering with interconnection to the database(s) or the processing of routing and customer information.").

[178] Ericsson Sur-Reply at 24.

C. The NANC's and the SWG's FACA Violations Preclude the Commission's Reliance on Their Work Product.

1. Use Injunctions Are Appropriate When FACA Is "Rendered A Nullity."

The D.C. Circuit has held that injunctive relief to remedy FACA violations—specifically, prohibiting an agency from relying on a committee's work product prepared in violation of FACA—is appropriate "if the unavailability of an injunctive remedy would effectively render FACA a nullity."[179] As FACA was designed both to "reduce wasteful expenditures" and to "enhance the public accountability of advisory committees," courts balance these two policy factors in determining whether FACA would be more honored in preserving or discarding work that was prepared at substantial expense but with little or no public accountability.[180] Because FACA violations discovered "after a committee has completed its meetings and is in the process of wrapping up its affairs will likely [always] produce waste," in such instances courts specifically consider "the magnitude of the waste, the value of the committee's work to the sponsoring federal agency and the effect of the FACA violation on the committee's findings."[181] Thus, where the "FACA violation appears to have had [significant] deleterious effect on the

---

[179] *Cal. Forestry Ass'n v. U.S. Forest Serv.*, 102 F.3d 609, 614 (D.C. Cir. 1996). Ericsson's suggestion in its Sur-Reply that agencies have no duty to ensure that their FACs comply with FACA because FACA "contains no enforcement provisions" is contradicted by Ericsson's subsequent acknowledgement that, under *California Forestry*, use injunctions barring an agency from relying on a report prepared in violation of FACA are appropriate in at least some cases. *See* Ericsson Sur-Reply at 24.

[180] *Cal. Forestry*, 102 F.3d at 614 (internal quotation marks omitted). The omission of any discussion of the second "public accountability" factor animating FACA from Ericsson's Sur-Reply speaks for itself. *See* Ericsson Sur-Reply at 25 ("FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings . . . ." (alteration in original) (internal quotation marks omitted)); *id.* at 26 ("Such a result would be inconsistent with the FACA's aim to reduce wasteful expenditures." (internal quotation marks omitted)).

[181] *Natural Res. Def. Council v. Pena*, 147 F.3d 1012, 1026-27 (D.C. Cir. 1998).

committee's output and accountability and the public's participation," a use injunction prohibiting an agency from relying on work prepared in violation of FACA is appropriate.[182]

The combined effect of the NANC's and the SWG's FACA violations exemplify what it means to render FACA a nullity. "[G]iven the vital importance of . . . numbering resources to telecommunications," the Commission found that it was "essential [to] create the NANC as a federal advisory committee."[183] Pursuant to the "industry model," the Commission charged the NANC with providing transparent oversight and advice on numbering administration, envisioning that "FACA will ensure that [the NANC's] activity and advice to the Commission is the result of open and impartial discussion."[184] Yet the NANC delegated its LNPA oversight and advisory functions to the industry-heavy SWG, the SWG operated without transparency in recommending an LNPA, and the NANC reviewed the SWG's work in a closed meeting and forwarded the work to the Commission. No minutes, working papers, or drafts have been made available for public inspection that would explain these actions or provide for public accountability, only sterilized final reports. At no point did the Commission receive LNPA selection advice from its advisory committees that was the result of open discussion, and at no point did the public have the opportunity to participate in or review the record of these committees' LNPA selection deliberations. If a FAC were allowed to operate this way and evade FACA's strictures merely by delegating to itself, in the guise of a subcommittee comprised of its own members, all of its advisory functions, FACA would be rendered a dead letter.

---

[182] *Id.*

[183] *Numbering Plan Order*, 11 FCC Rcd. at 2609 ¶ 45.

[184] *Id.* at ¶ 48.

2. Petitioner Suffered Substantial Harm as a Result of the Absence of FACA Compliance from the LNPA Selection Process.

Ericsson argues in its Sur-Reply that, "[b]ecause [Petitioner] claims no specific harm, its FACA allegations, even if true, raise no concern."[185] To the contrary, the lack of FACA-required transparency, public accountability, and balanced participation in the LNPA selection process to date has harmed both Petitioner and the public. As Petitioner has previously explained, the recommendations of the SWG and the NANC were riddled with substantive flaws and omissions of key requirements, reflecting the significant procedural irregularities that plagued the LNPA selection process. For example, the selection criteria, RFP requirements and ultimate recommendations of the SWG and the NANC lacked any clear benchmarking against current requirements for the NPAC, in particular omitting critical law enforcement, public safety, disaster recovery, emergency preparedness and national security requirements.[186] They lacked specific transition requirements for the LNPA directed at preserving interoperability, interconnection, consumer mobility, and retail competition in the NPAC system.[187] Likewise, they lacked specific requirements to support the ongoing transition to IP in the nation's telecommunications networks.[188] Further still, they lacked any substantive evaluation of vendor neutrality, which is the primary statutory requirement for the LNPA—a glaring omission in light

[185] Ericsson Sur-Reply at 25.

[186] *See* Comments of Neustar, *Petition of Telcordia Technologies Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration and to End the NAPM LLC's Interim Role in Number Portability Administration Contract; Telephone Number Portability,* WC Dkt. Nos. 07-149 & 09-109, CC Dkt. No. 95-116, 102–116 (filed Jul. 25, 2014) ("Neustar Comments"); Neustar Reply Comments at 64–87.

[187] *See* Neustar Comments at 46–47, 78–82, 92–101.

[188] *See* Neustar Comments at 89–91; Neustar Reply Comments at 55–57.

of Ericsson's conspicuous non-neutrality.[189] Finally, they lacked any meaningful consideration and evaluation of the risks and costs inherent in the transition entailed by the SWG's and NANC's recommendations, which stand to impact both consumers and smaller carriers.[190]

These serious flaws and omissions were not born in a vacuum. Rather, the SWG's and the NANC's failures to comply with FACA's requirements for maintenance and disclosure of records, open meetings and fairly balanced membership, as detailed above, were significant contributing factors directly informing the selection process and resulting in the flawed recommendations ultimately put forward by the SWG and the NANC. In contrast to Ericsson's claims now, the failure of the NANC and the SWG to allow for public input into these critical NPAC issues[191]—or at the least to generate an internal record evaluating these issues for public review—had an unambiguous "deleterious effect" on the process, causing real injury to Petitioner and the carriers, public safety users, and consumers that depend on this critical telecommunications infrastructure. If ever reliance on advisory committees' work prepared in violation of FACA—merely to prevent "waste"—would reduce FACA to a nullity, it is here.[192]

Additionally, Ericsson argues that even "[i]f the FACA was violated, the notice-and-comment process in which [Petitioner] has already actively taken part" somehow remedies the LNPA selection process's utter lack of public transparency and accountability, relying on

---

[189] *See* Neustar Comments at 13–49; Neustar Reply Comments at 8–30.

[190] *See* Neustar Reply Comments at 42–49.

[191] *See Numbering Plan Order*, 11 FCC Rcd. at 2609 ¶ 45; Public Notice, Wireline Competition Bureau Announces GSA's Approval of the Renewal of the North American Numbering Council Charter Through September 20, 2015, CC Dkt. No. 92-237, DA 13-2227 (rel. Nov. 20, 2013) ("The value of this federal advisory committee to the telecommunications industry and to the American public cannot be overstated.").

[192] *See Pena*, 147 F.3d at 1026–27.

California Forestry Association v. United States Forest Service, 102 F.3d 609, 614 (D.C. Cir. 1996).[193] However, in relying on this case, Ericsson inaccurately characterizes the appellee U.S. Forest Service's argument against a use injunction as the court's own analysis; in fact the court declined to assess any remedy at all.[194] Specifically, the U.S. Forest Service argued that it should not be precluded from relying on a report prepared by its FAC, the Sierra Nevada Ecosystem Project ("SNEP"), in violation of FACA because any rulemaking concerning the Sierra Nevada forest system would "be subject to full notice and comment and ultimately to judicial review."[195] The appellant, California Forestry Association ("CFA"), countered that these procedures were insufficient to remedy the SNEP's FACA violations, arguing that the public's inability to review the scientific evaluations used to produce the SNEP report rendered the report "effectively [un]reviewable" and "irreparably compromised" its integrity.[196] The D.C. Circuit found that it could not "assess these competing claims [on appeal] and therefore remand[ed] to the district court to fashion an appropriate remedy in the first instance."[197]

In remanding, the D.C. Circuit directed the district court to focus on the degree of public accountability and participation that, in spite of the SNEP's FACA violations, went into the preparation of its report, rather than the *post hoc* remedial measures available after the report had already been produced:

---

[193] Ericsson Sur-Reply at 24.

[194] *See id.* ("The court warned that it could frustrate the purposes of the FACA to enjoin the Forest Service's use of a study where—like here—'the rulemaking will be subject to full notice and comment and ultimately judicial review.'").

[195] 102 F.3d at 613.

[196] *Id.* at 613–14.

[197] *Id.* at 614.

> The record indicates that at least some of the Science Team meetings were open to the public. Furthermore, SNEP made other efforts to keep the public informed - it published newsletters and provided information to a "key contacts group" comprised of eighty-seven individuals and representatives of various organizations, including CFA. The need for injunctive relief may be reduced where, as here, there has been at least some attempt to ensure public accountability.[198]

Moreover, in order for subsequent notice and comment rulemaking procedures to remedy prior FACA violations and preclude a use injunction, they must "render harmless . . . the loss of any past opportunity to participate."[199] As the SWG failed to make even token efforts at ensuring public accountability in preparing its *Working Group Report* or *Selection Process Report*, no amount of *post hoc* "notice and comment" on those scrubbed reports—especially comment on a record devoid of all other documents that FACA requires—can remedy such a tainted process. Additionally, as Ericsson concedes, the June 9 Public Notice was not a notice of proposed rulemaking; it did not adequately identify for the public the issues under consideration; and the resulting comments did not create the sort of record that could address the deficiencies in the NANC recommendation.[200] Accordingly, the Commission may not rely on the current LNPA selection process record that was prepared by the NANC and the SWG in violation of FACA.

---

[198] *Id. See also Pena*, 147 F.3d at 1026–27 ("Substantial efforts to include members of the interested public in at least some committee meetings . . . counsel against a use injunction.").

[199] *Pena*, 147 F.3d at 1026–1027.

[200] *See* Ericsson Sur-Reply at 25. Petitioner has consistently urged the Commission that APA rulemaking is required before the Commission may designate a new entity to serve as LNPA, and reaffirms that argument here. *See e.g.*, Neustar Comments at 50–63. However the Commission resolves the FACA deficiencies identified in this Petition, that rulemaking is required.

3. The Need for Public Accountability Is Heightened Where, as Here, FACA Violations Are Coupled with an Appearance of Partiality.

In balancing the need to discard an advisory committee's work due to FACA violations, courts weigh an additional factor: the appearance of bias or partiality. Concerns about waste of resources are minimized, and the need for public accountability and participation is heightened when, as here, FACA violations are coupled with evidence of favoritism.[201] As the court in *Lorillard* recently held in rejecting the FDA's Menthol Report, which was prepared by a FAC whose members had apparent conflicts of interest:

> [I]n order for the Committee's work product to be credible and reliable, it ha[s] to be perceived by both the public and the interested industries as being free of bias . . . . [Bias] whether actual or perceived—undermine[s] the public's confidence in the agency's decision-making process and render[s] its final product suspect, at best. . . . [I]n the context of a FACA violation . . . . where, as here, a report such as the Menthol Report is prepared by an advisory committee that . . . give[s] reason to question the impartiality of its conclusions and recommendations, it is not a "waste" to reject it.[202]

The Commission recognized the importance of preventing even the appearance of partiality in creating the NANC under FACA, concluding that "the broad representation and public access requirements of FACA will prevent industry perceptions that the NANC is biased."[203]

Here, the initial decisions and recommendations in the selection process were made by the NAPM, a group dominated by large telecommunications carriers, and overseen by the SWG,

---

[201] *Lorillard, Inc. v. U.S. Food & Drug Admin.*, No. 11-440 (RJL), 2014 WL 3585883, at *14 & n.24 (D.D.C. July 21, 2014); *see also Pub. Citizen*, 491 U.S. at 453 ("FACA was enacted to cure specific ills, above all . . . biased proposals.").

[202] *Lorillard*, 2014 WL 3585883, at *15 & n.24 (citation omitted).

[203] *Numbering Plan Order*, 11 FCC Rcd. at 2611 ¶ 53.

which was hardly more "balanced."[204] The process has been marred by procedural irregularities that have consistently favored Ericsson—a telecommunications equipment manufacturer with multi-billion dollar financial arrangements with multiple NAPM, SWG, and NANC members[205]—to Petitioner's detriment. As Petitioner explained in its comments submitted pursuant to the June 9 Public Notice, the "rules that purportedly governed the process were first ignored in favor of the interests of Ericsson"—by allowing Ericsson to submit an untimely bid—"then, non-existent rules were invoked to bar the industry from seeking more favorable bids when that was in the interest of Ericsson."[206] The appearance of partiality engendered by the procedural irregularities that have characterized the selection process, coupled with the lack of any FACA-compliant documentation or explanation of these irregularities, warrant rejection of the NANC's and SWG's work.[207]

---

[204] That all NANC and SWG members are "appointed as representatives of the telecommunications industry," rather than as "Special Government Employees" subject to certain conflict of interest and ethical requirements, *see* NANC Charter ¶ 12, underscores the risk of perceived bias when FACA's transparency and balance requirements are not met. *See Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 921–22 (Buckley, J., concurring) ("Because committees not composed exclusively of [government] officers and employees have members who are not required to foreswear their private associations and insulate themselves against potential conflicts of interest, FACA requires, as an alternative check, that their deliberations be conducted in the open.").

[205] *See* Neustar Comments at 18. Additionally, Ericsson's Head of Region of North America, Angel Ruiz, serves as a board member on CTIA, a wireless industry trade group that is also a NANC member. *See* Management, Ericsson.com, http://www.ericsson.com/thecompany/corporate_governance/company_management (last visited Oct. 7, 2014).

[206] *Id.* at 65.

[207] *See Lorillard*, 2014 WL 3585883, at *14; *Pena*, 147 F.3d at 1026–27; *Cal. Forestry*, 102 F.3d at 614.

4. The Commission Must Reopen the Selection Process.

With no valid work from the NANC or SWG, neither the Bureau nor the Commission can lawfully select the next LNPA for two reasons. First, selecting a vendor in the absence of advisory committee oversight and recommendations would deviate from the Commission's own rules, adopted by the Commission in 1995 and applied to the current LNPA selection process in the Bureau's 2011 Orders. Departure from the Commission's own rules would be arbitrary and capricious.[208]

Second, the record, as it exists, is irreparably tainted by actions taken by the NANC and SWG over the course of the selection process without complying with FACA. For example, the SWG **[BEGIN CONFIDENTIAL INFORMATION]** [redacted] [**END CONFIDENTIAL INFORMATION**] As no amount of independent fact finding by the Commission could remedy the exclusion of such vital information from the record, the Commission cannot lawfully select a vendor without reopening the selection process.

IV. CONCLUSION

For the foregoing reasons, the Commission should order (i) that the NANC and the SWG are subject to and have violated FACA; (ii) that the Commission will not make use of either the NANC LNPA recommendation or the record of the LNPA selection process developed by the NANC and SWG; and (iii) that the selection process will be reopened to permit the development of a record that complies with FACA.

---

[208] *See Mass. Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711–12 (D.C. Cir. 1985) ("It has long been settled that a federal agency must adhere firmly to self-adopted rules by which the interests of others are to be regulated."); *see also United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 83 (D.D.C. 2011) (collecting cases).

Respectfully submitted,

/s/ *Brendan V. Sullivan Jr.*
Brendan V. Sullivan Jr.
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000

Counsel for Neustar, Inc.

/s/ *Aaron M. Panner*
Aaron M. Panner
KELLOGG, HUBER, HANSEN, TODD,
EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Counsel for Neustar, Inc.

October 22, 2014